COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052667-00**

Kevin Dupuis	Employee
Phillip Beaulieu Home Improvement	Employer
Legion Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Costigan, Carroll and Horan)

APPEARANCES
Michael D. Facchini, Esq., for the employee
Eliza Gerlach, Esq., for the insurer at hearing
James M. Rabbitt, Esq., for the insurer at oral argument

COSTIGAN, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for workers' compensation benefits for injuries sustained when he fell from a roof at a job site. The judge found that the fall was caused by the employee's intoxication, which constituted serious and wilful misconduct under G. L. c. 152, § 27, and barred his claim.[1] The employee mounts three challenges to the judge's decision. First, he argues that the administrative judge abused his discretion in denying the employee's motion to amend his claim to include a claim

[1] General Laws c. 152, § 27, as amended by St. 1935, c. 331, provides:

> If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation; but this provision shall not bar compensation to his dependents if the injury results in death.

Section 27 "is an affirmative defense, and therefore the insurer carries the burden of proving the employee was guilty of serious and willful misconduct." Yassin v. Gennaro's Eatery, 18 Mass. Workers' Comp. Rep. 237, 239 (2004). Here, our review of the board file, see Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), confirms that the insurer raised § 27 in defense of the employee's claim from the outset. (See Insurer's Notification of Denial filed January 17, 2001.)

under § 28.[2] Second, he contends that the judge erred in admitting into evidence unauthenticated and uncertified hospital records, in contravention of G. L. c. 233, § 79G, and G. L. c. 152, § 20. Third, the employee argues that the administrative judge's finding of serious and wilful misconduct under § 27 is arbitrary, capricious, and contrary to law. Seeing no merit in any of these arguments, we affirm the judge's decision.

We set forth the judge's findings relevant to the issues on appeal:

> [A]fter hearing the testimony, I am persuaded that Kevin Dupuis was indeed an employee of Lou Black.[3] I further find that on the day in question, Mr. Black did not tell [the employee] not [to] be on the roof.
>
> However, I find that Mr. Dupuis' intoxication was most probably responsible for his slipping off the roof, and that he is not, therefore entitled to benefits under the Act. While the employee is correct in citing Eldridge's Case, 310 Mass. 830 (1941) [rescript op.] that intoxication of the employee does not *require* a finding that the injury resulted from the employee's intoxication, in this case I am persuaded that in fact the intoxication did result in Mr. Dupuis' fall and injury. In this I follow the law as suggested in In re Von Ette, 223 Mass. 56, 59 (1916) where the Supreme Judicial Court suggests that if the employee fell from the roof due to a condition of intoxication, he would not be entitled to compensation.
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> Neither is this a case such as Caron's Case, 351 Mass. 406 (1966), in which it was found that the employee's drinking was done at a business meeting the employee had been directed to attend. In that case the drinking could be said to have arisen out of the circumstances of his employment. In this case, Mr. Dupuis' drinking did not arise in the context of the workplace. He arrived at the workplace inebriated, and therefore, I find that under Section 27, he bears the consequences of that action.

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[2] General Laws c. 152, § 28, as amended by St. 1986, c. 599, § 45, provides in pertinent part:

> If the employee is injured by reason of the serious and wilful misconduct of an employer or of any person regularly entrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In case the employer is insured, he shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section, and the employer is insured, the employer may appear and defend against such claim only.

[3] Lou Black was the uninsured subcontractor of Philip Beaulieu Home Improvement, the insured employer. (Dec. 2.) See G. L. c. 152, § 18.

(Dec. 4-5.) (Emphasis original.)

It was entirely permissible for the judge to infer that the employee fell off the roof due to his intoxication. Both at hearing and now on appeal, the employee cites Eldridge's Case, supra, for the proposition that intoxication *cannot* be the reason for a finding of serious and wilful misconduct under § 27. We agree with the judge that the employee misreads that case's holding. See id. ("And the evidence did not *require* a finding that the injury resulted from the employee's being under the influence of alcoholic liquor. An affirmative finding to the contrary *was permissible* on the evidence.")(Emphasis added.)

Here, the judge's factual finding of intoxication is fully warranted by evidence properly admitted. The judge did not, as the employee contends, improperly rely on hospital records that were a) uncertified, and b) admitted in contravention of the notice requirements of G. L. c. 233, § 79G.[4] Our review of the record indicates that the Baystate Medical Center records, allowed as additional medical evidence due to medical complexity under § 11A(2), (Dec. 2), were indeed certified, (Insurer Ex. 2),[5] and even if

[4] General Laws c. 233, § 79G, as amended by St. 1988, c. 130, provides in pertinent part:

> In any proceeding commenced in any court, commission or agency, . . . reports, including hospital medical records, . . . or any report of any examination of said injured person, including, but not limited to hospital medical records subscribed and sworn to under the penalties of perjury by the . . . authorized agent of a hospital . . . shall be admissible as evidence of . . . the diagnosis of said physician . . . , the prognosis of such physician . . . , the opinion of such physician . . . as to proximate cause of the condition so diagnosed, the opinion of such physician . . . as to disability or incapacity, if any, proximately resulting from the condition so diagnosed; provided, however, that written notice of the intention to offer such . . . report as such evidence, together with a copy thereof, has been given to the opposing party . . . , or to his . . . attorneys, by mailing the same by certified mail, return receipt requested, not less than ten days before the introduction of same into evidence, and that an affidavit of such notice and the return receipt is filed with the clerk of the court, agency or commission forthwith after said receipt has been returned.

[5] As to his emergency admission on the date of injury, October 14, 2000, the employee offered into evidence some, but not all, of the hospital records offered by the insurer. In comparing the exhibits, we note that some of the records missing from the employee's submission, (Employee Ex. 5), and included in the insurer's submission, (Insurer Ex. 2), contained multiple references to the employee's use of cocaine and alcohol prior to his fall, although other records offered by the employee contained similar histories. In any event, notwithstanding the employee's evidentiary

the insurer failed to give notice under § 79G of c. 233, those certified hospital records were admissible under G. L. c. 152, § 20.[6] Thus, the procedural requirements of G. L. c. 233, § 79G, did not apply under these circumstances. See Moseley v. New England Fellowship for Rehab. Alternatives, 13 Mass. Workers' Comp. Rep. 316, 321-323 (1999). Moreover, after lengthy discussion among the judge, employee's counsel and insurer's counsel, (Tr. 195-199), it was agreed *by all* that both the employee's and the insurer's packet of medical and hospital records would be admitted into evidence. (Tr. 200). The employee cannot properly raise on appeal an issue he waived below. Green v. Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655 (2000).

In any event, at oral argument, employee's counsel acknowledged that the fact of the employee's intoxication was elemental to the § 28 claim the employee sought to join. The employee alleged that the employer knew he was intoxicated and allowed him to go up on the roof anyway. This, the employee argues, was "the intentional doing of something either with the knowledge that it is likely to result in serious injury, or a wanton and reckless disregard of its probable consequences." Scaia's Case, 320 Mass. 432, 433-434 (1946), quoting Burns's Case, 218 Mass. 8, 10 (1914). Moreover, in his brief, the employee has not raised any argument as to the judge's finding that his intoxication caused the fall. Thus, the correctness of that finding is beyond dispute as a matter of law.

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challenge to the insurer's submission, the hospital records he offered were not certified. That fact may account for the discrepancies between the parties' respective submissions.

[6] General Laws c. 152, § 20, as amended by St. 1953, c. 314, § 6, provides:

> Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, certified by the persons in custody thereof to be true and complete, shall be admissible in evidence in proceedings before the division or any member thereof. The division or any member, before admitting any such copy in evidence, may require the party offering the same to produce the original record. All medical records and reports of hospitals, clinics and physicians of the insurer, employer, or of the employee shall be filed with and open to the inspection of the division so far as relevant to any matter before it. Such reports shall be open to the inspection of any party.

The employee's other argument on appeal is likewise without merit. The judge was within his sound discretion to deny the employee's motion to amend his claim to include a claim under § 28 for alleged serious and wilful misconduct by the employer. The employee had not sought to join the employer, an indispensable party to a § 28 claim, to the proceeding. See 452 Code Mass. Regs. § 1.20. The employer had not been summoned to be present at the hearing for purposes of a § 28 claim.[7] No claim under § 28 had been filed, "on a form provided by the Department," prior to the hearing.[8] Moreover, when the employee at hearing renewed his motion to amend his claim, the judge denied the motion without prejudice.[9] Given those facts, we are satisfied that the judge did not abuse his discretion in denying amendment of the employee's claim and

[7] Lou Black, the uninsured employer/subcontractor, was summoned to the hearing by both the employee and the insurer, (Tr. 14, 108), but was called as a witness and questioned on direct and re-direct examination by the employee. (Tr. 73-98, 106-118.) Nothing in the record indicates that he participated in the hearing in any capacity other than witness, or that he was represented by counsel. Philip Beaulieu, the insured employer/general contractor, was called as a witness by the insurer. (Tr. 180.) Nothing in the record indicates that he participated in the hearing in any capacity other than witness, or that he was represented by counsel. See footnote 9, infra.

[8] At oral argument on October 20, 2004, employee's counsel noted that he had moved to join a § 28 claim as early as the § 10A conference, and had renewed that motion at the January 21, 2003 hearing. He conceded, however, that an actual § 28 claim had been filed only three weeks prior to oral argument. In any event, the judge's conclusion that the employee's claim was barred by § 27 meant that no compensation was due that could be doubled under the provisions of § 28.

[9] "Let's take the 28 claim first. Essentially given that you're several times removed away from the employer and the employer would need to be here with counsel, I am going to deny it without prejudice and you can bring that at a later time." (Tr. 13.)

joinder of the uninsured employer at that late stage of adjudication.[10]

The decision is affirmed.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **March 11, 2005**

[10] The parameters of judicial discretion are well-established:

> By [discretion of the court] is implied absence of arbitrary determination, capricious disposition, or whimsical thinking. An exhibition of ungoverned will, or a manifestation of unbridled power is not the use of discretion. The word imports the exercise of discriminating judgment within the bounds of reason. Discretion in this connection means a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just. It may be assumed that conduct manifesting abuse of judicial discretion will be reviewed and some relief afforded.

Davis v. Boston Elevated Ry., 235 Mass. 482, 496-497 (1920). See also, Arrington v. Tewksbury Home Painting, 14 Mass. Workers' Comp. Rep. 313, 317 (2000); Saez v. Raytheon, 7 Mass. Workers' Comp. Rep. 20, 22 (1993).